Entry 05 30 90/ 06 06 90
Section 107 of 17 USCS Limitations on exclusive rights: FAIR USE

Notwithstanding the provisions of section 106 [17 USCS Sec 106], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecorders or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-
(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

eff date of this section 01 01 78

IN GENERAL: "Fair Use" means that others may copy theme or ideas of work, but not its expressions. Sheldon v MGM 1936 81 Fad 49.
Some tests to be used to determine fair use: (a) extent and relative value of extracts, (b) purpose and whether quoted portions might be used as substitute for original work, (c) effect on distribution and objects of original work. BMC v F-R Pub Corp 1940 31 F Supp 817

In copyright infringement action, fair use is a mixed question of law and fact; where Dist Ct has found facts sufficient to evaluate each of statutory factors relating to fair use defense, appellate ct need not remand for further factfinding, but may conclude that challenged use does not qualify as fair use. Harper & R v Nation Enterprises (1985) 471 US 539 11 Media LR 1969

List of examples stated in 17 USCS Sec 107 to give idea of sort of activities courts might regard as fair use circumstances is not intended to be exhaustive or to single out any particular use as presumptively fair use Harper & Row v Nat Enterprises (1985) 471 US 539 11 Media LR 1969

Critical biography of L. Ron Hubbard is strongly entitled to fair use in copying from Hubbard's words and unpublished letters (available from court records of other litigation) to show boastfulness, deceitfulness, and other undesirable characteristics of Hubbard New Era Pub International v Henry Holt & Co (1988) 695 F Supp 1493 15 Media LR 2161.

Although market for works of L. Ron Hubbard may be adversely affected by defendant's critical biography, such criticism is

Ron Hubbard, so that biography is not enjoined New Era Pub International v Henry Holt & Co (1988) 695 F Supp 1493 15 Media LR 2161 later proceeding CA2 NY 16 Media LR 1559.

Defendant's copying of 11 most important pages of plaintiff's 35 page book on cake decoration so that the 11 pages comprise about half of the defendant's 24 page book is substantial taking that is not protected by fair use Marcus v Rowley (1983) 695 F2d 1171.

Effect of use upon potential market for or value of copyrighted work is single most important element of fair use; once copyright holder established with reasonable probability existence of casual connection between infringement and loss of revenue, burden properly shifts to infringer to show that damages would have occurred had there been no taking of copyrighted expression; in order to negate fair use, one need only show that if challenged use should become widespread, it would adversely affect potential market for copyrighted work; inquiry must take account not only of harm to original, but also to harm to market for derivative works Harper & Row v Nation Enterprises (1985) 471 US 539 11 Media LR 1969.

Although TV broadcast of scenes from movies of famous actor does not compete with market for movies, it competes with similar biographical and derivative works about actor being prepared by copyright proprietor and is not excused under judge-made fair use doctrine Roy Export Co Establishment etc v CBS (1980) 503 F supp 1137 affirmed 672 F2d 1095 8 Media LR 1637.